2001

Utah v. Alvie Grover : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20010262-CA
ALVIE GROVER,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM AN ORDER DENYING A MOTION TO WITHDRAW GUILTY PLEA TO FORCIBLE SEXUAL ABUSE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-404 (1999); IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE G. RAND BEACHAM PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order denying a motion to withdraw guilty plea to forcible sexual abuse, a second degree felony, in violation of Utah Code Ann. § 76-5-404 (1999); in the Fifth Judicial District Court of Washington County, State of Utah, the Honorable G. Rand Beacham presiding. This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(e) (1996).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Issue No. 1: Did the trial court abuse its discretion in denying defendant's motion to withdraw a guilty plea where the evidence clearly indicated that defendant was competent to enter a plea?

Standard of Review: "The denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard, incorporating a clearly erroneous standard for findings of fact made in conjunction with that decision." *State v. Martinez*, 2001 UT 12, ¶ 14, 26 P.3d 203.

Issue No. 2: Where defendant was competent to enter a plea, was defendant prejudiced by his counsel's failure to timely obtain a competency evaluation?

Standard of Review: "When . . . the claim of ineffective assistance [of counsel] is raised for the first time on appeal, [an appellate court] resolve[s] the issue as a matter of law." *State v. Strain*, 885 P.2d 810, 814 (Utah App. 1994) (footnote omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following are reproduced in **Addendum A**:

Utah R. Crim. P. 11;
Utah R. App. P. 23B;
Utah R. App. P. 24;
Utah Code Ann. § 77-15-5 (1999).

STATEMENT OF THE CASE AND FACTS[1]

On March 31, 1997, defendant's minor daughter told a child protection worker that defendant repeatedly raped and sodomized her between 1993 and 1995 while she lived in his home. R. 3-4

* * *

Defendant was charged by information with rape of a child and sodomy on a child, both first degree felonies. R. 1-2 Pursuant to a plea agreement, on June 5, 1997, defendant pled guilty to forcible sexual abuse, a second degree felony. R. 23-31.

During his plea hearing, defendant was asked various questions by the court, and he responded appropriately in a clear and coherent manner. R. 155. At the onset of the plea hearing, the trial court inquired whether defendant was "currently under the influence of alcohol or drugs or medication[.] R. 155:7. Without hesitation, defendant responded, "No, your Honor." *Id.* Defendant was also asked whether he was "suffering from any mental or physical disease or defect that makes it hard for [him] to understand what [he is] doing[.]" *Id.* Again, defendant responded in the negative. *Id.*

The trial court also questioned defendant about the written plea statement that he had signed and initialed. R. 155:6-7. Defendant indicated that he had read the agreement and understood its terms. *Id.* In that agreement, defense counsel indicated that he had

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[1]To avoid unnecessary repetition, the State has combined its Statement of the Case and Statement of the Facts.

"discussed [the plea agreement] with the [d]efendant and believe[d] that the [d]efendant fully understands the meaning of its contents and is mentally and physically competent." R. 24-29.

After entering his plea, defendant requested that he be sentenced immediately without the benefit of a presentence report. R. 155.12. The trial court honored defendant's request and sentenced him to the statutory indeterminate prison term of one to fifteen years. R. 32-36; 155; 161:20-21.

Defendant moves to withdraw his guilty plea and requests the appointment of an alienist. On June 18, 1997, defendant filed a timely Motion to Withdraw Guilty Plea and Petition for Determining Competency and Appointment of Alienist. R. 38-41. In response, the court ordered the appointment of an alienist. R. 43-45; 154. Defendant filed an Amended Petition for Determining Competency and Appointment of Alienist on September 23, 1997. R. 52-54. At a hearing on October 7, 1997, the court reentered its order for the appointment of an alienist. R. 55; 156.

Alleging ineffective assistance of counsel, defendant filed a notice of appeal on August 14, 1997. R. 46-49. In a memorandum decision dated January 23, 1998, this Court dismissed defendant's appeal on jurisdictional grounds. R. 62-64. The case was remitted to the trial court on January 23, 1998. R. 60-61.

On November 4, 1999, the court held a hearing in response to defendant's request for new counsel. R. 69-70; 157:3-4. At the hearing, counsel for defendant stated that he

had attempted to have an alienist appointed but was unsuccessful because defendant had been transferred from Purgatory Correctional Facility to the Utah State Prison for two years, and the prison would not honor the trial court's order. R. 157:4-7. Because defendant was presently housed locally at Purgatory Correctional Facility, the court denied defendant's request for new counsel and ordered that an alienist be appointed within the following two weeks. R. 157:8-10.

The court reviewed the status of defendant's case two weeks later, on November 18, 1999. R. 72-73; 158. At that point, still no alienist had been appointed. R. 158.3-5 As a result, the court chastised defendant's counsel for his inaction and relieved him as defendant's counsel. R. 158:10-11. Defendant was appointed a new attorney. R. 158:11-13.

Later that same month, John Moyes, an alienist, met with defendant at the jail R. 163:5-6, 38-39. For an hour, Moyes spoke with defendant, asking him numerous questions. R. 163:38-39. At that point, Moyes determined that it would be an impossible task to determine whether defendant was competent during his plea hearing 30 months prior. R. 163:5-6, 38-39.

The evidentiary hearing on defendant's motion to withdraw his plea. On February 6, 2001, following a string of continuances and frivolous pro se motions, the trial court held an evidentiary hearing on defendant's motion to withdraw his guilty plea. R. 81-88, 90-96, 98-111, 113-16; 161; 162; 163.

At that hearing, defendant testified that he had suffered from drug-induced delusions at the time his guilty plea was entered. *See* R. 163:30-57. In particular, defendant claimed that in March of 1997, three months before his plea hearing, he caught his wife putting drugs into his food, and on his cigarettes. R. 163:32-35, 41-44. As a result of his wife's actions, he began to suffer from drug-induced dementia. R. 163:35. Defendant claimed that he began hearing bells in his sleep, and voices during the day. R. 163:35-38. The voices inducted him into a "secret society," instructed him to treat judges as if they were God, and told him to trust the judicial system. R. 163:37, 48-50. During his plea hearing, defendant testified that he felt as though his head was in a "blender," and was unable to concentrate for a span of "three seconds." R. 163: 37, 47-50. This condition caused defendant to forget his thoughts. *Id.* Due to those delusions, defendant claimed that he was not competent to enter a guilty plea. R. 163.

On cross-examination, however, defendant clarified that his delusions came in episodes. R. 163:55-56. Defendant could not explain why he pled guilty to a DUI offense and was sentenced to probation during the same period of time he claimed to have been suffering from drug-induced dementia, and yet did not seek to withdraw that plea. R. 163:54-57. Defendant also admitted that he did not inform the court of his alleged drug delusions before entering his plea, but had only divulged the delusions after he was sentenced to a prison term. R. 163:48. Additionally, defendant did not provide documentation and witnesses to corroborate his story that his wife had drugged him or

that prison officials and doctors were aware of his alleged mental condition. R. 163:32-35, 41-47. Finally, despite allegedly suffering from a mental illness that affected his ability to concentrate for a span of "three seconds," made his head feel like it was in a "blender," and caused him to forget his thoughts, defendant admitted that he was able to appropriately answer the court's questions throughout the plea hearing and now, four years later, could distinctly remember his thought patterns during that hearing. R. 163:37, 47-50.

Defendant called Agent Frank Martin to testify that a year before the plea hearing, he witnessed defendant acting strangely. R. 163:10-16.

After reviewing the video recording of defendant's plea hearing, *see* R. 163:17-30, and listening to the testimony from Agent Martin and defendant, *see* R. 163:10-16, 30-57, the trial court issued a Memorandum Decision denying defendant's motion to withdraw his plea. *See* R. 119-125. The court found that defendant had not shown good cause to withdraw his plea because (1) Agent Martin's testimony was not relevant to the specific time-frame of defendant's plea hearing, (2) defendant's testimony was entirely subjective, uncorroborated by any contemporaneous source, and too self-serving to be persuasive, and (3) on the video recording of defendant's plea hearing, defendant appeared to be responsive, alert, and entirely lucid throughout his colloquy with the court. *See id.*

ARGUMENT SUMMARY

On appeal, defendant challenges the trial court's finding that he was competent to enter a guilty plea. Defendant wholly fails to marshal the evidence supporting the trial court's competency findings, or show how those findings were insufficient. Thus, defendant has not shown that the court's finding of competency was clearly erroneous.

In any event, given the clear evidence of defendant's competency, the trial court correctly concluded that defendant was competent to plead guilty The videotape of defendant's plea hearing, as well as his plea statement, show that defendant was alert, lucid, and responsive to the court's questions and that he possessed the ability to consult with his lawyer with a reasonable degree of rational understanding and had a rational as well as factual understanding of the charges against him.

Next, defendant contends that he was denied effective assistance of counsel because of his attorney's inaction in timely securing an alienist's examination after his plea hearing. Under the second prong of the *Strickland* test, defendant cannot show that he was prejudiced by his counsel's inaction, because he has presented no credible evidence that he was incompetent. Furthermore, to the extent that defendant claims that an alienist's exam would have corroborated his testimony, he failed to request a rule 23B remand to remedy that gap in the record. Accordingly, defendant's ineffective assistance of counsel claim fails.

ARGUMENT

POINT I

DEFENDANT FAILS TO MARSHAL THE EVIDENCE SUPPORTING THE TRIAL COURT'S FINDING THAT DEFENDANT WAS COMPETENT TO ENTER HIS GUILTY PLEA; IN ANY EVENT, GIVEN THE CREDIBLE EVIDENCE OF DEFENDANT'S COMPETENCY, THE TRIAL COURT'S FINDING WAS NOT CLEARLY ERRONEOUS.

Defendant claims the trial court erred in denying his motion to withdraw his guilty plea. Br. of Aplt. at 5-8. The crux of defendant's argument is that he was incompetent to enter a guilty plea. *See id.* Defendant does not claim that he was insane when he entered his guilty plea. Rather, he claims at the time he entered his plea, he was suffering from a drug-induced dementia that rendered him incompetent to plead guilty. *Id.* Defendant's claim is really a challenge to the trial court's finding that he was responsive, alert, and lucid throughout the plea hearing, and therefore, competent to enter his plea. Because defendant neglects to properly marshal the clear evidence in support of the trial court's factual findings, and fails to show that those findings were clearly erroneous, his claim fails.[2]

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[2]Although defendant cites cases interpreting rule 11(e), Utah Rules of Criminal Procedure, defendant does not claim that the trial court failed to strictly comply with the requirements of rule 11(e). *See* Br. of Aplt. at 5-8. Indeed, on appeal defendant concedes that "[r]ule 11 had been complied with at the time [he] entered his guilty plea." Br. of Aplt. at 7. Thus, where the trial court strictly complied with the requirements of rule 11(e), defendant's plea is presumed to be knowingly and voluntarily offered. *See State v. Martinez*, 2001 UT 12, ¶ 22, 26 P.3d 203.

A. Defendant has not marshaled the evidence in support of the trial court's finding of competency.

"A trial court's factual findings will not be reversed absent clear error." *State v. Widdison*, 2001 UT 60, ¶ 60, 28 P.3d 1278. "To demonstrate that a finding of fact is clearly erroneous, the defendant 'must first marshal all the evidence that *supports* the trial court's findings. After marshaling the supportive evidence, the appellant then must show that, even when viewing the evidence in a light *most favorable to the trial court's ruling*, the evidence is insufficient to support the trial court's findings.'" *Id.* (citing *State v. Gamblin*, 2000 UT 44, ¶ 17 n. 2, 1 P.3d 1108) (emphasis in original).

In this case, defendant has not met his marshaling burden. In his brief, defendant does not set forth any of the evidence in support of the trial court's findings; rather, he merely notes the portions of the record which favor his position. *See* Br. of Aplt. at 4-8. Further, defendant fails to show that the evidence, when viewed in a light most favorable to the trial court's ruling, is insufficient to support the trial court's findings. *See* Br. of Aplt. at 4, 7 (citing only defendant's testimony that he was suffering from drug-induced mental problems during his plea hearing, the trial court's order appointing an alienist which was never fully executed, and the State's stipulation to that order as evidence of defendant's incompetency). Where defendant fails to marshal the evidence and show that the evidence was insufficient, he cannot show that the trial court's finding that he was "responsive," "alert," and "lucid" was clearly erroneous. *See State v. Benvenuto*, 1999 UT 60, ¶ 13, 983 P.2d 556 (where the defendant made no attempt to marshal the

evidence, the trial court's findings were accepted as stated in its ruling on the defendant s motion to withdraw his plea). Thus, defendant's challenge to the court's factual findings fails. *See Widdison*, 2001 UT 60, ¶ 60.

B. The trial court's finding that defendant was competent was not clearly erroneous.

Notwithstanding defendant's failure to marshal, defendant fails to show that the trial court's competency finding was clearly erroneous.[3] "In determining whether a defendant is competent to plead guilty, the trial court must consider whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *State v Holland*, 921 P 2d 430, 433 (Utah 1996).

Here, the evidence supporting the trial court's competency determination was substantial. In determining that defendant was competent to plead guilty, the trial court considered defendant's testimony and that of Agent Martin, a videotape of defendant's demeanor and statements during his plea hearing, and defendant's plea agreement. *See* R. 163. After reviewing that evidence, the court found that the videotape and defendant's plea agreement were more credible than defendant's self-serving testimony. *See* R. 119-25.

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[3]The trial court investigated defendant's competency claim during the hearing of defendant's motion to withdraw his guilty plea. *See* R. 163. In its ruling on defendant's motion to withdraw, under the rubric of a "good cause" determination the trial court found that defendant had a full knowledge and understanding of his plea. *See* R. 119-25 Although the court found that defendant was responsive, alert, and lucid throughout the plea hearing, in effect, court found that defendant was competent to enter a plea. *See id*

On the videotape, before learning of his prison sentence, defendant acknowledged that his state of mind was not in any way impaired by drugs or mental disease and defects *See* R 163 22 He also participated in an extensive colloquy with the court, in which he responded timely and appropriately to the court's lengthy inquiries *See* R. 163 20-28 During that colloquy, defendant indicated to the court that he understood the proceedings against him. *See id.* Specifically, defendant stated that he understood the factual nature of the case against him, that he was waiving certain constitutional rights, and that he understood the maximum penalties associated with his crime *See id* Defendant also indicated that he agreed with his attorney in supporting the State's factual basis for his guilty plea. *See* R. 163 26. Moreover, as the trial court observed, defendant's demeanor during the plea hearing was "responsive, alert, and entirely lucid." *See* R. 119-25 Based on that evidence, the court concluded that defendant had a full knowledge and understanding of his plea. *See id.*

Similarly, defendant's plea agreement corroborates his statements during the plea hearing At the end of defendant's plea agreement statement, defense counsel indicated that he had "discussed [the plea agreement] with the [d]efendant and believe[d] that the [d]efendant fully understands the meaning of its contents and is mentally and physically competent." R. 24-29. By signing and initialing the plea agreement, defendant again indicated that he understood the proceedings against him and was able to consult with his attorney in a rational fashion. *See id.*

In contrast to the videotape and defendant's plea agreement, the court found defendant's testimonial evidence to be irrelevant to his plea hearing *See* R. 119-25 In particular, the court found that although defendant claimed he was being drugged by his wife, he did not testify that she was drugging him when he entered his plea. *See* R 119-25, 163 32-35, 41-44. Indeed, defendant had expressly denied to the court that he was under the influence of any drugs or medication at that time. *See* R. 155 7 The court also found that Agent Martin's testimony about an incident that occurred a year before defendant's plea hearing was irrelevant to the time of defendant's plea hearing. *See* R 119-25.

The court also found defendant's testimony was uncorroborated by any contemporaneous sources. *See id.* Although defendant claimed that the prison officials and doctors were aware of his alleged mental condition, he was unable to provide documentation of doctor visits or witnesses to substantiate that claim. *See* R. 163 44-47 Furthermore, defendant did not present his wife's testimony to corroborate his tale *See generally* R. 163.

Finally, the trial court found that defendant's testimony was unpersuasive. When defendant was asked about his alleged confusion in signing the plea agreement, he unconvincingly asserted that "[he] wasn't supposed to go to prison." *See* R 119-25 Moreover, despite allegedly suffering from a mental illness that affected his ability to concentrate for a span of "three seconds," made his head feel like it was in a "blender,"

and caused him to forget his thoughts, defendant was able to appropriately answer the court's questions during the plea hearing and now, four years later, could distinctly remember his thought patterns during that hearing. R. 163: 37, 47-50. Accordingly, the trial court correctly concluded that defendant's testimonial evidence was irrelevant, uncorroborated, and "[was] simply too subjective and self-serving to be persuasive." R. 119-25.

In sum, the evidence conclusively demonstrated that at the time of his plea hearing, defendant possessed a "sufficient [] ability to consult with his lawyer with a reasonable degree of rational understanding and ha[d] a rational as well as factual understanding of the proceedings against him." *Holland*, 921 P.2d 430 at 433. Accordingly, the trial court correctly concluded that defendant was competent to plead guilty and did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.[4]

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[4]In addition, for the first time on appeal, defendant contends that the trial court erred under Utah Code Ann. § 77-15-5 (1999) by not staying the hearing on defendant's motion to withdraw his guilty plea until an alienist had examined defendant and the court had made a determination as to defendant's competency. Br. of Aplt. at 7-8. For the following reasons, defendant's claim fails. First, defendant did not ask the trial court to stay or continue the hearing. *See* generally R. 163; *State v. Cram*, 2002 UT 37, ¶ 9 ("As a general rule, claims not raised before the trial court may not be raised on appeal.") (citations and quotations omitted). Thus, where defendant fails to argue either plain error or exceptional circumstances his claim is waived on appeal. *See id.* Second, although defendant cites section 77-15-5, his claim is cursorily treated and he fails to offer any supporting authority or meaningful analysis. *See* Br. of Aplt. at 7-8; Utah R. App. P. 24(a)(9) ("The argument shall contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on."); *Gamblin*, 2000 UT 44 at ¶ 6 ("[An appellate court] is not a depository in which the appealing party may dump the burden of argument and

POINT II

WHERE DEFENDANT WAS COMPETENT TO ENTER A GUILTY PLEA, HE FAILS TO SHOW HOW HE WAS PREJUDICED BY HIS COUNSEL'S INACTION IN OBTAINING AN ALIENIST

Defendant next claims that he was denied the effective assistance of counsel because his counsel did not initially ensure that a competency evaluation was performed as ordered by the court. Br. of Aplt. at 8-10. "With respect to any ineffectiveness claim, a defendant must first demonstrate that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92, (quoting *Strickland v Washington*, 466 U.S. 668, 687-89 (1984)). "Second, the defendant must show that counsel's deficient performance was prejudicial—i.e., that it affected the outcome of the case." *Id.* Defendant's claim fails because he cannot establish prejudice. *See State v. Medina-Juarez*, 2001 UT 79, ¶ 14 (where a defendant fails to establish either prong of the *Strickland* test, counsel's

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research.") (citations and quotations omitted). Third, thirty months after defendant's guilty plea, Moyes, an alienist, told defendant that it would be impossible to determine whether defendant was suffering from drug-induced dementia at the plea hearing. *See* R. 163:5-6, 38-39. Therefore, given the impossibility of such a determination, a stay of defendant's motion to withdraw his plea would have been fruitless. *See Holland*, 921 P.2d 430 at 435 (competency to enter a guilty plea could not be determined years after the plea hearing). Moreover, it is doubtful that a alienist could have made an accurate determination of whether defendant was under the influence of drugs even 30 days after defendant's plea hearing. Finally, at his plea hearing defendant failed to raise a "substantial question of possible doubt"as to his competency, and therefore, he was not entitled to a competency hearing under section 77-15-5. *See Holland*, 921 P.2d 430 at 435.

assistance was constitutionally sufficient, and the other prong of the test need not be addressed); *State v. Martinez*, 2001 UT 12, ¶ 17, 26 P.3d 203 (inasmuch as the prejudice prong of the *Strickland* test is dispositive, the first prong need not be addressed).

"To show prejudice under the second prong of the *Strickland* test, a defendant must proffer sufficient evidence to support a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Arguelles*, 921 P.2d 439, 441 (Utah 1996) (citations and internal quotations omitted). "A reasonable probability is sufficient to undermine confidence in the outcome." *Id.* (citations and quotations omitted).

Assuming, but not conceding that council's performance was deficient, because defendant has not shown that he was incompetent during his plea hearing, he cannot show that he was prejudiced by his counsel's inaction in timely obtaining an alienist to examine defendant. As stated, defendant's only claim of incompetence was that he was suffering under a drug-induced dementia at the time of his plea hearing. However, the evidence of defendant's demeanor at the hearing, and his attorney's statements, all refute that claim. Therefore, defendant's claim that an alienist would have found him incompetent is nothing more than unsupported speculation. *See Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993) ("[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.").

Moreover, to the extent that defendant is claiming that his counsel's failure to timely secure an alienist's examination deprived him of the only objective evidence of his alleged incompetency, his claim also fails. "Where trial counsel's alleged ineffectiveness caused or exacerbated record deficiencies, defendant[] now [has] an appropriate procedural tool for remedying those deficiencies." *Litherland*, 2000 UT 76, ¶ 16. "If a defendant is aware of any 'nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective,' defendant bears the primary obligation and burden of moving for a temporary remand [under rule 23B, Utah Rules of Appellate Procedure]." *Id* (citing Utah R. App. P. 23B). Because defendant failed to remedy any gap in the evidence by requesting a rule 23B remand for an alienist to testify, his claim also fails. Accordingly, where defendant fails to show that he was prejudiced by his counsel's inactions, he cannot prove that his counsel was ineffective *See Medina-Juarez*, 2001 UT 79, ¶ 14, *Martinez*, 2001 UT 12, ¶ 17.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the trial court's denial of defendant's motion to withdraw his guilty plea.

Dated this 15th day of April, 2002.

MARK L. SHURTLEFF
Utah Attorney General

JEFFREY T. COLEMERE
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Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2002, I served two copies of the attached Brief of Appellee upon the defendant/appellant, ALVIE GROVER, by causing the same to be [ ] hand delivered [X] mailed, via first class mail, postage prepaid, to her counsel of record, as follows:

DOUGLAS D. TERRY
150 North 200 East, Suite 202
St. George, Utah 84770

ADDENDA

ADDENDUM A

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a sworn statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the sworn statement. If the defendant cannot understand the English language, it will be sufficient that the sworn statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h)(1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(j) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(Amended effective May 1, 1993; January 1, 1996; November 1, 1997; November 1, 2001.)

Rule 23B. Motion to remand for findings necessary to determination of ineffective assistance of counsel claim.

(a) *Grounds for motion; time.* A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

(b) *Content of motion; response; reply.* The content of the motion shall conform to the requirements of Rule 23. The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits shall also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. The motion shall also be accompanied by a proposed order or remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.

A response shall be filed within 20 days after the motion is filed. The response shall include a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed by the trial court in the event remand is granted, unless the responding party accepts that proposed by the moving party. Any reply shall be filed within 10 days after the response is filed.

(c) *Order of the court.* If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court for the purpose of entry of findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand shall identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the trial court. The order shall also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.

If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) *Effect on appeal.* Oral argument and the deadlines for briefs shall be vacated upon the filing of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.

(e) *Proceedings before the trial court.* Upon remand the trial court shall promptly conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness not identified in the order of remand shall not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration of issues not specifically identified in the order of remand. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand shall be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

(f) *Preparation and transmittal of the record.* At the conclusion of all proceedings before the trial court, the clerk of the trial court and the court reporter shall immediately prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) *Appellate court determination.* Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

(Added effective October 1, 1992; amended effective April 1, 1998.)

Rule 24. Briefs.

(a) *Brief of the appellant.* The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, including the contents of the addendum, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(7) *A statement of the case.* The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) *Summary of arguments.* The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) *An argument.* The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

(10) *A short conclusion stating the precise relief sought.*

(11) *An addendum to the brief or a statement that no addendum is necessary under this paragraph.* The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) *Brief of the appellee.* The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant, or

(2) an addendum, except to provide material not included in the addendum of the appellant The appellee may refer to the addendum of the appellant.

(c) *Reply brief* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal Reply briefs shall be limited to answering any new matter set forth in the opposing brief The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule No further briefs may be filed except with leave of the appellate court

(d) *References in briefs to parties* Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee" It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) *References in briefs to the record* References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g) References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber References to exhibits shall be made to the exhibit numbers If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected

(f) *Length of briefs* Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs

(g) *Briefs in cases involving cross-appeals* If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders The brief of the appellant shall not exceed 50 pages in length The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length The appellant shall then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant s opening brief. The appellant's second brief shall not exceed 25 pages in length The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief The lengths specified by this rule are exclusive of table of contents, table of authorities, and addenda and may be exceeded only by permission of the court The court shall grant reasonable requests, for good cause shown

(h) *Briefs in cases involving multiple appellants or appellees* In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another Parties may similarly join in reply briefs

(i) *Citation of supplemental authorities.* When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(j) *Requirements and sanctions.* All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(k) *Brief covers.* The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

(Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999.)

77-15-5. Order for hearing — Stay of other proceedings — Examinations of defendant — Scope of examination and report.

(1) When a petition is filed pursuant to Section 77-15-3 raising the issue of the defendant's competency to stand trial or when the court raises the issue of the defendant's competency pursuant to Section 77-15-4, the court in which proceedings are pending shall stay all proceedings If the proceedings are in a court other than the district court in which the petition is filed, the district court shall notify that court of the filing of the petition The district court in which the petition is filed shall pass upon the sufficiency of the allegations of incompetency If a petition is opposed by either party, the court shall, prior to granting or denying the petition, hold a limited hearing solely for the purpose of determining the sufficiency of the petition If the court finds that the allegations of incompetency raise a bona fide doubt as to the defendant s competency to stand trial, it shall enter an order for a hearing on the mental condition of the person who is the subject of the petition.

INQUIRY INTO SANITY OF DEFENDANT

(2) (a) After the granting of a petition and prior to a full competency hearing, the court may order the Department of Human Services to examine the person and to report to the court concerning the defendant's mental condition.

(b) The defendant shall be examined by at least two mental health experts not involved in the current treatment of the defendant

(c) If the issue is sufficiently raised in the petition or if it becomes apparent that the defendant may be incompetent due to mental retardation, at least one expert experienced in mental retardation assessment shall evaluate the defendant. Upon appointment of the experts, the petitioner or other party as directed by the court shall provide information and materials to the examiners relevant to a determination of the defendant's competency and shall provide copies of the charging document, arrest or incident reports pertaining to the charged offense, known criminal history information, and known prior mental health evaluations and treatments.

(d) The court may make the necessary orders to provide the information listed in Subsection (c) to the examiners.

(3) During the examination under Subsection (2), unless the court or the executive director of the department directs otherwise, the defendant shall be retained in the same custody or status he was in at the time the examination was ordered.

(4) The experts shall in the conduct of their examination and in their report to the court consider and address, in addition to any other factors determined to be relevant by the experts:

(a) the defendant's present capacity to:

(i) comprehend and appreciate the charges or allegations against him;

(ii) disclose to counsel pertinent facts, events, and states of mind,

(iii) comprehend and appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against him,

(iv) engage in reasoned choice of legal strategies and options,

(v) understand the adversary nature of the proceedings against him;

(vi) manifest appropriate courtroom behavior; and

(vii) testify relevantly, if applicable,

(b) the impact of the mental disorder, or mental retardation, if any, on the nature and quality of the defendant's relationship with counsel,

(c) if psychoactive medication is currently being administered

(i) whether the medication is necessary to maintain the defendant's competency; and

(ii) the effect of the medication, if any, on the defendant's demeanor and affect and ability to participate in the proceedings

(5) If the expert's opinion is that the defendant is incompetent to proceed, the expert shall indicate in the report:

(a) which of the above factors contributes to the defendant's incompetency;

(b) the nature of the defendant's mental disorder or mental retardation and its relationship to the factors contributing to the defendant's incompetency;

(c) the treatment or treatments appropriate and available, and

(d) the defendant's capacity to give informed consent to treatment to restore competency

(6) The experts examining the defendant shall provide an initial report to the court and the prosecuting and defense attorneys within 30 days of the receipt of the court's order The report shall inform the court of the examiner's opinion concerning the competency of the defendant to stand trial, or, in the alternative, the examiner may inform the court in writing that additional time is needed to complete the report If the examiner informs the court that additional time is needed, the examiner shall have up to an additional 30 days to provide the report to the court and counsel The examiner must provide the report within 60 days from the receipt of the court's order unless, for good cause shown, the court authorizes an additional period of time to complete the examination and provide the report

(7) Any written report submitted by the experts shall·

(a) identify the specific matters referred for evaluation;

(b) describe the procedures, techniques, and tests used in the examination and the purpose or purposes for each,

(c) state the expert's clinical observations, findings, and opinions on each issue referred for examination by the court, and indicate specifically those issues, if any, on which the expert could not give an opinion, and

(d) identify the sources of information used by the expert and present the basis for the expert's clinical findings and opinions.

(8) (a) Any statement made by the defendant in the course of any competency examination, whether the examination is with or without the consent of the defendant, any testimony by the expert based upon such statement, and any other fruits of the statement may not be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced evidence The evidence may be admitted, however, where relevant to a determination of the defendant's competency

(b) Prior to examining the defendant, examiners should specifically advise the defendant of the limits of confidentiality as provided under this subsection

(9) When the report is received the court shall set a date for a mental hearing which shall be held in not less than five and not more than 15 days, unless the court enlarges the time for good cause The hearing shall be conducted according to the procedures outlined in Subsections 62A-12-234(9)(b) through (9)(f) Any person or organization directed by the department to conduct the examination may be subpoenaed to testify at the hearing If the experts are in conflict as to the competency of the defendant, all experts should be called to testify at the hearing if reasonably available The court may call any examiner to testify at the hearing who is not called by the parties If the court calls an examiner, counsel for the parties may cross-examine the expert

(10) A person shall be presumed competent unless the court, by a preponderance of the evidence, finds the person incompetent to proceed The burden of proof is upon the proponent of incompetency at the hearing An adjudication of incompetency to proceed shall not operate as an adjudication of incompetency to give informed consent for medical treatment or for any other purpose, unless specifically set forth in the court order

(11) (a) If the court finds the defendant incompetent to stand trial, its order shall contain findings addressing each of the factors in Subsections 77-15-5(4)(a) and (b) The order issued pursuant to Subsection 77-15-6(1) which the court sends to the facility where the defendant is committed or to the person who is responsible for assessing his progress toward competency shall be provided contemporaneously with the transportation and commitment order of the defendant, unless exigent circumstances require earlier commitment in which case the court shall forward the order within five working days of the order of transportation and commitment of the defendant.

(b) The order finding the defendant incompetent to stand trial shall be accompanied by:

(i) copies of the reports of the experts filed with the court pursuant to the order of examination if not provided previously;

(ii) copies of any of the psychiatric, psychological, or social work reports submitted to the court relative to the mental condition of the defendant;

(iii) any other documents made available to the court by either the defense or the prosecution, pertaining to the defendant's current or past mental condition.

(12) If the court finds it necessary to order the defendant transported prior to the completion of findings and compilation of documents required under Subsection (11), the transportation and commitment order delivering the defendant to the Utah State Hospital, or other mental health facility as directed by the executive director of the Department of Human Services or his designee, shall indicate that the defendant's commitment is based upon a finding of incompetency, and the mental health facility's copy of the order shall be accompanied by the reports of any experts filed with the court pursuant to the order of examination. The executive director of the Department of Human Services or his designee may refuse to accept a defendant as a patient unless he is accompanied by a transportation and commitment order which is accompanied by the reports.

(13) Upon a finding of incompetency to stand trial by the court, the prosecuting and defense attorneys shall provide information and materials relevant to the defendant's competency to the facility where the defendant is committed or to the person responsible for assessing his progress towards competency In addition to any other materials, the prosecuting attorney shall provide:

(a) copies of the charging document and supporting affidavits or other documents used in the determination of probable cause,

(b) arrest or incident reports prepared by a law enforcement agency pertaining to the charged offense,

(c) information concerning the defendant's known criminal history

(14) The court may make any reasonable order to insure compliance with this section.

(15) Failure to comply with this section shall not result in the dismissal of criminal charges.

ADDENDUM B

IN THE FIFTH DISTRICT COURT - ST. GEORGE DEPARTMENT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ALVIE JARED GROVER, Defendant.	ENTRY OF PLEA Case #971500413 Appeal #970245 Judge James L. Shumate

BE IT REMEMBERED that this matter came on for hearing before the above-named court on June 5, 1997.

WHEREUPON, the parties appearing and represented by counsel, the following proceedings were held:

CERTIFIED TRANSCRIPT

(Electronically recorded.)

ORIGINAL

PENNY C. ABBOTT, CSR - LIC. 22-102811-7801
SALEM, UT 84653
PHONE: (801) 423-1009 FAX: (801) 423-2663

A-P-P-E-A-R-A-N-C-E-S

FOR STATE OF UTAH:

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FOR DEFENDANT:

ODEAN BOWLER, ESQ.
205 EAST TABERNACLE STREET, #200
ST. GEORGE UT 84770

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(June 5, 1997)

THE JUDGE: And finally, State of Utah versus Alvie Grover, 971500405 and 971500413.

MR. BOWLER: May we approach, Your Honor?

THE JUDGE: Pardon?

MR. LANGSTON: Can we approach?

THE JUDGE: Sure.

(Sidebar discussion).

MR. LANGSTON: I should have brought it up. What we're anticipating doing is reducing the charge to a second degree felony, one second degree. He is anticipating that there, he knows the recommendation is going to be prison.

MR. BOWLER: And he wants to have the sentencing done today, so...

MR. LANGSTON: He wants to do it today. So he didn't want to go up there with a sexual abuse of a child on his rap sheet. I agreed to talk to the victim and they agreed to just call it forcible sexual abuse without listing the child. I wanted the Court to know why we agreed to do that.

THE JUDGE: I see.

MR. LANGSTON: And I guess if he wants to go ahead today we're (short inaudible, no mic).

THE JUDGE: I understand there is additional danger there.

MR. LANGSTON: Yes. So, so that's why.

THE JUDGE: Do you have an Amended Information?

MR. LANGSTON: I do.

THE JUDGE: Okay.

MR. LANGSTON: I do, I have it.

MR. BOWLER: Yes. Everything's set.

THE JUDGE: All right.

(End sidebar discussion).

THE JUDGE: Now I understand what you're doing on the felony case. What about the misdemeanor case?

MR. LANGSTON: Your Honor, we would agree to dismiss the charges in that case.

THE JUDGE: All right.

MR. LANGSTON: I don't think I specifically stated that in the plea agreement but that is (short inaudible, no mic).

THE JUDGE: Okay. Let's deal with the case ending 413 first then.

MR. LANGSTON: Okay. I have the paperwork here.

THE JUDGE: Thanks.

MR. LANGSTON: I think I signed that. I'm not... The plea agreement.

THE JUDGE: Yes.

MR. LANGSTON: Okay.

THE JUDGE: Yes. All right. Anything else you

want to say about this before I discuss it with Mr. Grover?

MR. BOWLER: Your Honor, there is one other thing we had, Your Honor, there is an order to show cause out--

MR. LANGSTON: Oh, on another misdemeanor case?

MR. BOWLER: On another misdemeanor case. And part of the agreement would be that this would be (short inaudible, no mic) concurrent with anything that happens on that order to show cause.

MR. LANGSTON: I didn't bring that file with me but we did list the case number in the plea agreement that we would agree to, he would admit to a probation violation and that, that was pending and then I think that was a misdemeanor. Right?

MR. BOWLER: Yes, it was.

MR. LANGSTON: And we would just ask that... In fact, I don't know, perhaps just close that unsuccessfully and sentence him on this one.

MR. BOWLER: That would be fine.

THE JUDGE: That's something that could be done just on paperwork anyway then.

MR. LANGSTON: I think so.

THE JUDGE: Okay. All right. Let me review this with you, Mr. Grover. The name I have is Alvie Grover, is that your full name?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Okay. I have your birthdate as 3-26-62. Is that accurate?

DEFENDANT GROVER: Correct, Your Honor.

THE JUDGE: Okay. Mr. Grover, have you read the Amended Information that I've just been given which would charge you with forcible sexual abuse, a second degree felony?

DEFENDANT GROVER: I have, Your Honor.

THE JUDGE: Do you have any questions about that or is there anything you'd like to have me read for you?

DEFENDANT GROVER: No, Your Honor.

THE JUDGE: Okay. Have you also read this Statement of Defendant Regarding Plea Agreement?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Do you have any questions about what it says?

DEFENDANT GROVER: No, Your Honor.

THE JUDGE: It looks like it's been initialled and signed by you today. Is that correct?

DEFENDANT GROVER: That is correct, Your Honor.

THE JUDGE: Did you read it first before you signed it?

DEFENDANT GROVER: I did.

THE JUDGE: Did you sign it and initial it to indicate that you accept these terms and you understand them?

DEFENDANT GROVER: Yes, I did, Your Honor.

THE JUDGE: Okay. This does say that you will plead guilty to this second degree felony charge. Is that what you want to do?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Has anyone made any threats against you to get you to plead guilty?

DEFENDANT GROVER: No, Your Honor.

THE JUDGE: Has anyone promised you anything that's not in this plea agreement and I haven't been told?

DEFENDANT GROVER: Not that I'm aware of, Your Honor.

THE JUDGE: Okay. Are you currently under the influence of alcohol or drugs or medication?

DEFENDANT GROVER: No, Your Honor.

THE JUDGE: Are you suffering from any mental or physical disease or defect that makes it hard for you to understand what you're doing?

DEFENDANT GROVER: No, Your Honor.

THE JUDGE: Okay. Mr. Grover, you need to understand your alternatives. You have been ordered to stand trial on the case after waiving your preliminary hearing. But you're still entitled to have your trial because you're still presumed to be innocent until you enter a, a plea other than not guilty.

The presumption of innocence means that if you dispute this charge, and I'd be referring to the original charge in particular, the original charges, then you would not be convicted unless the state could prove you guilty beyond a reasonable doubt. If they don't have that kind of proof you can't be convicted.

Do you understand that?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Okay. If you would prefer to have your case go to trial then and force the state to try to bear the burden of proof, you have a right to do that.

You have the right to a jury trial with an impartial jury and have it scheduled on a speedy basis, which means really without any unreasonable delay, and you have a right to be present at all times during the trial with your attorney.

You have the right to confront and cross examine all the witnesses who testify against you, and you also have the right to call your own witnesses to testify.

You have the right to have the court order your witnesses to appear by subpoenas issued by the court and served on them.

You would also have the right to testify at your trial if you want to but you have a constitutional right to remain silent and that applies throughout your trial. If you don't want to testify at the trial no one will force you to do

that, and the jury will be instructed that they cannot consider that evidence that you're hiding something or evidence that you're guilty in any way. The state has to be able to bear the burden of proof regardless of whether you say anything, otherwise you can't be convicted.

Do you have any questions about any of that?

DEFENDANT GROVER: No, Your Honor.

THE JUDGE: Okay. Mr. Grover, if you plead guilty to this charge in the Amended Information you will be admitting that you committed that offense and by admitting it you'll be giving up your right to have a trial and you'll be subjecting yourself to sentencing because you'd be convicted without a trial.

Do you understand that's how this works?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Okay. If you're convicted of a second degree felony the maximum sentence would be a term at the Utah State Prison not less than one year and not more than 15 years. There also could be a $10,000 fine plus a percentage surcharge, and an order to pay restitution for any damages that might have been caused.

Do you understand those maximum possibilities?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Okay. There have been no particular recommendations made to me on this case. Regardless of what

the attorneys may recommend you need to understand that the Court can impose the maximum sentence.

Do you understand?

DEFENDANT GROVER: I understand, Your Honor.

THE JUDGE: Okay. Mr. Grover, another important right that you give up if you plead guilty is your right to appeal. If you decided you'd prefer to have your case go to trial, and even if you were found guilty by the jury, you'd still have the right to appeal to a higher court to see if you could get the conviction overturned. But if you plead guilty voluntarily you're also giving up your right to appeal your conviction for almost every possible reason.

Do you understand that?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Mr. Grover, if you changed your mind about this plea you'd have to do it within the next 30 days, and you'd also have to file a written request to withdraw the plea within the 30 days. But you have to have the Court's permission so you have to meet that 30-day deadline and be able to prove that there's some good cause for you to withdraw your plea. You cannot withdraw a plea just by stating that you've changed your mind. The Court has to approve it.

Do you understand that?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Okay. Mr. Grover, do you have any

questions now about anything?

DEFENDANT GROVER: No, Your Honor.

THE JUDGE: Counsel, have I missed anything or do you know of any reason not to accept this plea?

MR. LANGSTON: I believe the Court's covered it all, Your Honor.

MR. BOWLER: No, Your Honor.

THE JUDGE: Okay. Mr. Grover, I'll ask for your plea then. As I said the Amended Information filed today charges you with forcible sexual abuse, a second degree felony, alleged to have occurred during the years 1993 through 1995 in Washington County. How do you plead to that charge?

DEFENDANT GROVER: Guilty.

THE JUDGE: What's the factual basis?

MR. LANGSTON: The State's evidence would be that during the time frame alleged in Washington County the defendant committed sexual acts with a child involving touching his genitals to hers and also touching her mouth to his genitals.

THE JUDGE: Mr. Bowler, will the defense accept that to support this plea?

MR. BOWLER: Yes, Your Honor.

THE JUDGE: Mr. Grover, do you agree with your attorney?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Do you understand what I mean by that?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: All right. Do you still want to plead guilty?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: I'll accept your plea then as a knowing and voluntary plea and it is entered, and judgment and conviction rendered. I'll execute the order approving the plea agreement and that be entered in the file.

Now, Mr. Grover, the rules of procedure give you the right to have at least two days before sentencing. As you know presentence reports are, as you may know presentence reports are often done to give the Court recommendations for sentencing.

First of all, do you want to postpone your sentencing for a period of time?

DEFENDANT GROVER: No, Your Honor.

THE JUDGE: All right. Mr. Bowler, have you discussed this with Mr. Grover?

MR. BOWLER: Yes I have, Your Honor.

THE JUDGE: All right. Mr. Grover, does that mean that you prefer to go ahead with sentencing today?

DEFENDANT GROVER: Yes, Your Honor.

THE JUDGE: Okay. Mr. Bowler, are there any statements you want to make about sentencing?

MR. BOWLER: Yes, Your Honor. I would, I would make the recommendation that anything that the, that the Court deems fit to impose in this matter would be done in conjunction with treatment programs. I think it's fairly obvious that my client has some problems that need to be addressed. I personally would like to see him get out on probation to address these. I don't believe that's going to be a viable possibility for the Court to give him probation at this stage but there may be a possibility of having him locally in jail and allow him out for treatments. I think it's obvious, again, that he needs help. And again, whatever the Court decides to impose I would like to see treatment of some manner be attached with the sentence.

THE JUDGE: Okay. Mr. Grover, do you have any statement to make?

DEFENDANT GROVER: Yes. The treatment thing, and it'll, it'll all turn out all right in the end. I trust the judicial system.

THE JUDGE: Okay. All right. Mr. Langston?

MR. LANGSTON: Your Honor, our recommendation would be that he be committed as per statute to one to 15 in the Utah State Prison. We have no problem at all with the Court attaching a recommendation that he receive treatment for his

problem as soon as possible, we have no problem with recommending credit for time that he has already served. But we believe that at this point the only alternative for the Court would be to commit him to prison.

THE JUDGE: Okay. Any other comment from the defense?

MR. BOWLER: No, Your Honor.

JUDGMENT AND SENTENCE

THE JUDGE: All right. With no information other than the little bit that I have in this file and in the other file, and with the belief that the Department of Corrections has the best available treatment programs for this situation, the sentence is that Mr. Grover be committed to the Utah State Prison for a period not less than one year, not more than 15 years.

I do recommend that the Department of Corrections consider admitting him to any appropriate treatment program they have available as soon as possible. I don't know what the situation is or what that would be and I wouldn't presume to order something specific beyond that.

Also, Mr. Grover should be given credit for time served in this case. I can't put my hand on the booking sheet so I don't know what date that is. But whatever the time is should be credited.

Mr. Grover, you now may have the right to appeal any

error of the Court or any issue that has not been waived, and to do that you have to file written notice of appeal within 30 days.

Good luck to you.

MR. LANGSTON: Thank you.

THE JUDGE: That can you, counsel.

MR. BOWLER: Thank you, Your Honor.

THE JUDGE: That being said then should we handle the misdemeanor case?

MR. LANGSTON: We'd just ask that be dismissed.

THE JUDGE: All right. The charges in case 050 or, I'm sorry, 0405 then are dismissed in connection with this plea agreement.

MR. BOWLER: Thank you, Your Honor.

WHEREUPON, the hearing was concluded.

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REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded videotape #970208 in the matter of STATE VS. ALVIE GROVER, hearing date June 5, 1997, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 16, inclusive except where it is indicated that the tape recording was inaudible.

WITNESS my hand and official seal this 8th day of August, 2001.

PENNY C. ABBOTT, CSR.
LICENSE #22-102811-7801
Notary Public, Comm Exp 9-24-04

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ADDENDUM C

IN THE FIFTH JUDICIAL DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ALVIE GROVER, Defendant.	MEMORANDUM DECISION Criminal No. 971500413 Judge G. Rand Beacham

This matter came before the Court on February 6, 2001 pursuant to Defendant's Motion to Withdraw Guilty Plea. Defendant was present with his counsel, Douglas D. Terry. Plaintiff was represented by Ryan W. Shaum. Having heard the testimony of Adult Probation and Parole agent Frank Smith, the testimony of Defendant, and the arguments of counsel, the Court took the motion under advisement. The Court then assigned its extern to research certain legal issues presented by the motion. Having considered all of the information and authorities presented, the Court rules as follows:

FACTS

On April 15, 1997, an Information was filed with this Court in which Defendant was charged with rape of a child and sodomy on a child, both first-degree felonies. At Defendant's first appearance on April 16, 1997, a public defender was appointed to represent defendant.

On June 5, 1997, an Amended Information was filed, changing the charges to one count of forcible sexual abuse, a second-degree felony, and Defendant appeared in court with counsel to enter a plea agreement. At the plea hearing, Defendant was questioned by the Court about his

understanding of the plea agreement. The written plea agreement was signed and initialed by Defendant and, after the plea colloquy was completed, Defendant's guilty plea was accepted and entered by the Court. Defendant further waived a pre-sentence investigation and any delay in sentencing, and was sentenced to be committed to the Utah State Prison for the time prescribed by statute. The Court's Judgment, Sentence, Restitution Judgment, Recommendation, and Commitment was entered June 10, 1997.

On June 18, 1997, Defendant's first public defender filed Defendant's Motion to Withdraw Guilty Plea, and a "Petition for Determining Competency and Appointment of Alienist." On July 3, 1997, the Order Appointing Alienist was signed and entered by the Court.

On September 23, 1997, Defendant's public defender filed Defendant's "Amended Petition for Determining Competency and Appointment of Alienist." On October 7, 1997, a review hearing was held, with counsel of record being present but Defendant not present, due to his transportation to the Utah State Prison. Although Defendant's attorney spoke of obtaining an alienist's opinion, apparently nothing was actually done.

During the period from the time of Defendant's commitment to the present time, Defendant has written numerous letters to the Court. Those letters have all been referred to Defendant's attorney for appropriate action. Upon receipt of a letter from Defendant on October 26, 1999, however, the Court learned that nothing had been done on Defendant's motion for more than two years. The Court then ordered a hearing. Defendant was present at that hearing on November 4, 1999, and requested that the Court appoint another attorney to represent him. The Court allowed Defendant's first attorney to remain in the case, but set another hearing for November 18, 1999 On that date, Defendant's first attorney again had nothing to report. The Court found that attorney to

have failed to represent Defendant with any acceptable degree of competence and diligence, and replaced that attorney with Defendant's current attorney.

On October 20, 2000, the Court received yet another letter from Defendant concerning his case, and ordered another review hearing for November 9, 2000. Thereafter, Defendant's current attorney scheduled the Motion to Withdraw Plea for hearing on December 21, 2000. Defendant had been moved by the Department of Corrections, however, and could not be transported to court for that hearing. The hearing was rescheduled for January 4, 2001.

When the hearing was commenced on January 4, however, Defendant requested that the Court replace his second attorney with a third attorney. Defendant was not entirely sure of his request, so the Court gave Defendant until January 15 to come to a decision. Defendant's written response gave no legitimate reasons for replacing his second attorney, so the Court set the matter again for hearing. At a hearing on February 1, 2001, the Court found insufficient grounds to change the assignment of Defendant's attorney and ordered that the Motion be heard on February 6.

At the hearing on February 6, 2001, Defendant was present to testify, and also called probation agent Frank Martin to testify. The evidence presented included the videotape record of Defendant's June 5, 1997 plea hearing. Defendant's attorney was not able to find an expert witness who would opine as to Defendant's competence as of the time he entered his guilty plea.

ANALYSIS

1. Delay

Defendant argues that he has been denied due process of law by the extraordinary delay, 44 months, between the time his motion was filed and the time it was heard. During that entire time, of course, Defendant has been incarcerated at various facilities under his commitment to the Department

of Corrections. Plaintiff does not argue that 44 months was a reasonable time, but correctly notes that the delay is not attributable to Plaintiff in any way.

The first 29 months of delay are attributable exclusively to the inaction of Defendant's first attorney. Some other delays were caused by the difficulties inherent in Defendant's commitment to prison and his incarceration at locations quite distant from this court. The final one-month delay was caused by Defendant's belated request to replace his current attorney, made at the very hearing at which his attorney was prepared to proceed with Defendant's motion; this is the only delay which is attributable to Defendant himself, however.

Neither Defendant's attorney nor the Court's extern was able to locate any precedent for Defendant's argument that the delay in the hearing of his motion, or the absence of an alienist's report, constitutes a denial of due process of law. The delay and the failure of Defendant's first attorney to obtain an alienist's report are inexcusable, but without any controlling precedent to support Defendant's argument, without even any comparable precedent, this Court cannot conclude that Defendant is entitled to withdraw his motion simply because of that delay and failure. Defendant's motion must be considered on its merits.

2. Good Cause

"A plea of guilty . . . may be withdrawn only upon good cause shown and with leave of the court." Utah Code Ann. §77-13-6(2)(a). The burden of proof is upon Defendant to show "good cause" for withdrawal of his plea. "Good cause" is not a defined term and is determined on a case-by-case basis. For example, "good cause" is shown, as a matter of law, where a trial court fails to comply strictly with Rule 11 of the Utah Rules of Criminal Procedure in accepting the plea. State v Smith, 812 P.2d 470 (Utah App. 1991). Defendant does not allege that the Court failed to strictly

comply with Rule 11, and the Court saw no such failure in the videotape of Defendant's plea hearing.

"Good cause" is also shown if a defendant proves that, at the time he entered his plea, he lacked a full knowledge and understanding of the consequences of the plea. State v. Vasilacopulos, 756 P.2d 92 (Utah App. 1988). Defendant suggests that his abuse of drugs had caused or contributed to serious mental problems which prevented him from understanding the consequences of his plea. In support of this suggestion, Defendant refers to the testimony of probation agent Frank Martin, who testified that he had dealings with Defendant in 1996, while Defendant was on supervised probation, and that Defendant had continued to abuse drugs and was thought by some hospital personnel to have methamphetamine psychosis. Mr. Martin could not testify, however, as to any drug use by Defendant or as to Defendant's mental condition as of the time Defendant entered his guilty plea.

Defendant further testified that he had an unusually strong reaction to methamphetamine use, but testified that he had not been using methamphetamine in 1997, when he entered his guilty plea. Defendant testified that his wife had "dosed" him with "heavy metals" in his cigarettes in early 1997, and that he had hallucinations for a couple of years thereafter, but he did not testify that any of this was occurring at the plea hearing. As evidence of his alleged confusion about the plea agreement, Defendant asserted "I wasn't supposed to go to prison," but fails to explain how he reached such a conclusion or why he failed to object to his prison sentence when he was sentenced by this Court. All of Defendant's own evidence on this point is entirely subjective and is not corroborated by any contemporaneous source. Defendant's testimony is simply too subjective and self-serving to be persuasive.

Finally, this Court had the opportunity to observe Defendant at his plea hearing and again on videotape at the hearing of Defendant's motion. On no occasion has this Court observed any

indication that Defendant was truly confused, misled, or uninformed about the consequences of his guilty plea when he appeared before this Court to enter the plea agreement. To the contrary, Defendant was responsive, alert, and entirely lucid when he participated in the plea colloquy with this Court on June 5, 1997.

CONCLUSION

Defendant has failed to bear his burden of proof to show any good cause for withdrawal of his guilty plea. Defendant's Motion to Withdraw Guilty Plea is denied.

DATED this 21th day of February, 2001.

G. RAND BEACHAM, JUDGE
FIFTH DISTRICT COURT